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In the Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

AL VERA, ET AL.

REV. WILLIAM LAWSON, ET AL., APPELLANTS

v.

AL VERA, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

AL VERA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Districts 18, 29, and 30 in Texas's congressional redistricting plan are narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

Plaintiffs are Al Vera, Edward Blum, Edward Chen, Pauline Orcutt, Barabara L. Thomas, and Kenneth Powers.

Defendants are George W. Bush, Governor of the State of Texas; Bob Bullock, Lieutenant Governor; Pete Laney, Speaker of the House of Representatives; Dan Morales, Attorney General; and Antonio Garza, Jr., Secretary of State.

Defendant-Intervenors are Rev. William Lawson, Zollie Scales, Jr., Rev. Jew Don Boney, Deloyd T. Parker, Dewan Perry, Rev. Caesar Clark, David Jones, Fred Hofheinz, Judy Zimmerman, Robert Reyes, Angia Garcia, Robert Anguiano, Sr., Dalia Robles, Nicolas Dominguez, Oscar T. Garcia, Ramiro Gamboa, League of United Latin American Citizens, and the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-805

GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

AL VERA, ET AL.

No. 94-806

REV. WILLIAM LAWSON, ET AL., APPELLANTS

v.

AL VERA, ET AL.

No. 94-988

UNITED STATES OF AMERICA, APPELLANT

v.

AL VERA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-104a) is reported at 861 F. Supp. 1304.

JURISDICTION

An order of the three-judge district court was entered on September 2, 1994. J.S. App. 105a-106a. That order was amended to afford injunctive relief on September 20, 1994. *Id.* at 107a-108a. A notice of appeal was filed on October 3, 1994. *Id.* at 109a-110a. This Court noted probable jurisdiction on June 29, 1995. 115 S. Ct. 2639 (1995). The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, 1973c, which are reproduced in the Appendix to the Jurisdictional Statement. J.S. App. 111a-113a.

STATEMENT

This case involves a challenge to the State of Texas's 1991 congressional redistricting plan. A three-judge district court invalidated three districts in the plan that were drawn to afford black and Hispanic voters an opportunity to elect candidates of their choice. The court found that those three districts—one in Dallas County and two in Harris County—placed voters into different districts on the basis of race without sufficient justification in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States, a defendant-intervenor below, has appealed from that judgment. The State of Texas and private intervening defendants have also appealed.

1. a. The State of Texas has a long history of discrimination against racial minorities in voting and in the law

governing elections. See J.A. 359-367; St. Exh. 17; see also *White* v. *Regester*, 412 U.S. 755 (1973) (racially dilutive multimember districts); *Texas* v. *United States*, 384 U.S. 155 (1966) (per curiam) (poll tax); *Terry* v. *Adams*, 345 U.S. 461 (1953) (white primary); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (same); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (same); *Nixon* v. *Herndon*, 273 U.S. 536 (1927) (same). That well-documented history of discrimination prompted Congress to extend Section 5 of the Voting Rights Act to Texas in 1975. See S. Rep. No. 295, 94th Cong., 1st Sess. 25-30 (1975). No district in Texas with a majority of white residents has ever elected a black member to Congress. St. Exh. 17, at 55. Nor has any black state senator ever been elected from a majority-white district. *Id.* at 51-52. Only two black state house members have been elected from districts with white population majorities. *Id.* at 51. Similar data exists regarding the failure of Hispanic candidates to win elections in districts with white majorities. J.A. 252; U.S. Exh. 1095 (letter dated Nov. 12, 1995, at 2).

b. Between 1980 and 1990, the population of Texas grew from approximately 14.2 million to almost 17 million. J.S. App. 9a. As a result, Texas was allocated three additional congressional seats in 1991, giving it a total of 30 seats. *Ibid.* The growth of the Hispanic and black populations in Texas during the 1980s was particularly substantial. *Id.* at 9a-10a. During that decade, the Hispanic population increased by more than 45%, and the black population increased by nearly 17%, while the Anglo population increased by 10%. *Id.* at 10a. By 1990, Hispanics constituted 22.5% of the total population, blacks constituted 11.6% of the population, and the percentage of Anglos had declined to 60.5% of the State's total population. *Id.* at 9a.

Much of Texas's population growth during the 1980s occurred in Harris County (in which Houston is located),

Dallas County (in which Dallas is located), and Bexar County (in which San Antonio is located). J.S. App. 10a. Increased Hispanic and black population accounted for most of the growth in those counties. *Id.* at 10a-12a. In recognition of the growth of population in Harris, Dallas and Bexar Counties, the Texas legislature placed Texas's three new congressional districts in those counties and drew the new districts in a way that would afford Hispanics and blacks in those areas the opportunity to elect candidates of their choice despite the State's history of racial discrimination in voting. *Id.* at 19a. Considered statewide, the plan enacted by the State in 1991 gave Hispanics an opportunity to elect candidates of their choice in seven of the State's 30 districts and blacks an opportunity to elect candidates of their choice in two districts. See Pl. Exh. 36, at 27.

c. In addition to affording the black and Hispanic minorities opportunities to overcome Texas's history of racial discrimination in voting, the State's 1991 plan also reflected the legislature's commitment to two other principles—that congressional districts would all contain the same number of residents and that district lines would be drawn to protect the reelection prospects of all incumbent representatives. J.A. 246-249; 1 Tr. 85; 3 Tr. 163, 215; U.S. Exh. 1071 Supp. at 12. The State has traditionally viewed incumbency protection as a very important consideration in redistricting. J.S. App. 12a-13a. Following the 1960 Census, for example, the State gained a congressional seat, but redistricted by creating an at-large seat in order to allow all incumbents' districts to remain intact. *Id.* at 12a. Later in the 1960s, Texas created a district that traversed a large portion of the State in order to protect an incumbent. *Id.* at 12a-13a. During redistricting in the 1970s, a delegation of state legislators working on redistricting flew to Washington,

D.C., to meet with members of the Texas congressional delegation on a group and individual basis. *Id.* at 13a. A participant in the redistricting process in the 1980s and 1990s testified that, "[f]or the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can." *Id.* at 13a n.9.

In the 1991 redistricting, the state legislature agreed to protect the seat of every sitting representative. J.S. App. 26a. Each Member of Congress and each state legislator with an interest in a particular district had an opportunity to help draw the lines of the district during the mapping process. *Id.* at 25a-26a. Representatives and legislators drew on several sources to assist them in that process. The legislature's computers could provide past election results on the redistricting maps on a precinct-by-precinct level; racial information about population was available at the census block level. *Id.* at 27a. Representatives also knew the partisan makeup of various areas from their own election experience and from driving through those areas. 3 Tr. 177-179. In addition, Democratic representatives and legislators had access to a database that provided political information on a household-by-household basis; they could therefore obtain the number of Democratic primary voters residing in any proposed district. *Id.* at 179. Incumbent congressional representatives and state legislators contemplating a run for Congress would often go to a legislative mapping room to evaluate proposed districts and to suggest changes that would improve their chances of winning. *Id.* at 168.

2. This appeal involves districts drawn in Dallas and Harris Counties. In deciding how to draw the districts in those two counties, the legislature took into account its obligations under the Voting Rights Act. J.S. App. 18a-22a. Believing that the Voting Rights Act required it to

do so, the legislature created a new black opportunity district in Dallas County and a new Hispanic opportunity district in Harris County. *Id.* at 18a-21a.[1] In addition, the legislature reconfigured a district in Harris County in which blacks had been able to elect a candidate of their choice over the past two decades so that they would continue to have that opportunity. *Id.* at 19a-21a.

The population of Dallas County is sufficient to support three and one-third districts. U.S. Exh. 1085. Blacks make up approximately 20% of the population in the County. U.S. Exh. 1084. In the State's plan, Dallas County is divided among seven districts. Four of those districts draw most of their population from Dallas County. Pl. Exh. 34P. The State's plan affords blacks in Dallas County an opportunity to elect a candidate of their choice in one of those four districts. Pl. Exh. 4C.

The Harris County population is sufficient to support five congressional districts. U.S. Exh. 1085. Hispanics make up approximately 23% of the population of the County, and blacks make up approximately 19% of the population. U.S. Exh. 1084. In the State's plan, Harris County is divided among seven congressional districts. Three of those districts draw all of their population from Harris County and one draws most of its population from it. Pl. Exh. 34P. The State's plan contains one district in Harris County that provides blacks with an opportunity to elect a candidate of their choice and one district that provides Hispanics with such an opportunity. J.A. 185, 229.

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[1] An opportunity district is a district in which the relevant minority group has a meaningful opportunity to elect the representative of its choice despite racial discrimination in voting either because it constitutes a voting majority in the district or because it constitutes a sizable minority that can elect its preferred candidate because some non-minorities will vote for the minority-preferred candidate.

a. District 30 is the black opportunity district in Dallas County. That district has a core area that contains half of the district's population and that is 69% black. J.S. App. 29a; J.A. 335. The district contains seven additional areas, each of which is highly irregular in shape. *Ibid.* The population of each of those areas is between 20% and 38% black. *Ibid.* Overall, District 30 is 50% black in total population, 47.1% black in voting-age population (VAP), and 50.3% black in citizen voting-age population (CVAP). St. Exh. 14; J.S. App. 30a. The black community in Dallas County believed a 50% black population district to be necessary to ensure that it would have an opportunity to elect a candidate of its choice. *Id.* at 22a.

The legislature decided to draw a black opportunity district in Dallas County in order to comply with the Voting Rights Act. J.S. App. 18a-20a, 89a-90a. The legislature knew that it was possible to create a reasonably compact black opportunity district in Dallas County. At least two such plans were presented to it. J.A. 139 (Johnson plan); Pl. Exh. 33 (Owens-Pate plan); see J.S. App. 59a-60a, 78a, 88a. The legislature was also aware that blacks in Dallas County are politically cohesive and that whites in the County usually vote as a bloc against black-preferred candidates. Shortly before the 1991 redistricting process began, a federal district court had found that voting in Dallas was racially polarized. *Williams* v. *City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990). Legislators involved in the redistricting process were aware of that finding. See Lawson Exhs. 7, 11.

Although it was possible to draw a reasonably compact black opportunity district in Dallas County, political considerations prevented that result. In practice, the lines of District 30 were the product of compromise among three incumbent elected officials: Eddie Bernice Johnson, Martin Frost, and John Bryant. J.S. App. 35a-38a. John-

son, who is black, is now the congressional representative from District 30. *Id.* at 30a. In 1991, Johnson was a Democratic state senator from Dallas County and the chair of the State senate's committee on congressional redistricting. *Id.* at 30a-33a. Frost and Bryant were incumbent white Members of Congress from Dallas. *Id.* at 33a. Prior to the 1991 redistricting, Frost's and Bryant's districts had divided heavily Democratic south Dallas County between them. Pl. Exh. 28C; 3 Tr. 187.

Early in the redistricting process, Johnson suggested a plan that included a reasonably compact district in Dallas with a 44% black total population. J.A. 139. That district would have afforded black voters an opportunity to elect the candidate of their choice. J.A. 234 & n.21; 5 Tr. 21. Johnson's proposed district was rejected, however, because it included substantial portions of Frost's and Bryant's existing districts, as well as Frost's and Bryant's own residences, in the new District 30. J.S. App. 35a & n.22, 59a. Another plan submitted to the redistricting committee, the "Owens-Pate plan," also drew a reasonably compact black opportunity district in Dallas. Pl. Exh. 33; J.S. App. 59a, 88a. That plan required eight incumbents to run against each other in four districts, however, and did not have the votes to pass. 4 Tr. 84, 179.

The ultimate shape of District 30 was dictated by a compromise designed to create a black opportunity district in which Johnson could run for Congress while still permitting Bryant and Frost to maintain a favorable partisan political mix in their districts. 1 Tr. 56-81, 3 Tr. 185-207. Bryant and Frost both objected to losing black and white Democratic voters in the southern area of proposed District 30. J.S. App. 36a. Frost especially objected to losing Democrats from the racially mixed Grand Prairie area who had supported him in past elections. *Id.* at 36a & n.23; 3 Tr. 188-189. Frost and Bryant had an interest in

retaining black voters because those voters had voted overwhelmingly Democratic in the past. J.S. App. 37a-38a. In order to satisfy those concerns of Frost and Bryant, several concentrations of black voters were removed from District 30 as it was originally proposed by Johnson and retained in Frost's and Bryant's Districts. 1 Tr. 80. District 30 was thus required to extend into north Dallas County in order to contain sufficient total population and sufficient black population to enable it to be a black opportunity district. J.A. 149; 3 Tr. 187-189. That led the State to create the irregular extensions that characterize the borders of District 30.

b. District 18 is the black opportunity district in Harris County; District 29 is the Hispanic opportunity district. The lines separating Districts 18 and 29 are highly irregular and closely track Hispanic and black population concentrations. J.S. App. 40a-41a. District 18 is 51% black in total population, 48.6% black in VAP, and 52.1% black in CVAP. St. Exh. 14; J.S. App. 40a. District 29 is 60.6% Hispanic in total population, 55.4% Hispanic in VAP, and 42.5% Hispanic in CVAP. *Ibid.*

The state legislature decided to draw one Hispanic opportunity district and one black opportunity district in Harris County in order to comply with the Voting Rights Act. J.S. App. 18a-19a, 89a-90a. In prior redistrictings, blacks and Hispanics had been combined to form a majority of the population in District 18. St. Exh. 17, at 44, 55-56. As of the 1980 redistricting, the district's population was 40.8% black and 31.2% Hispanic. See *Seamon* v. *Upham*, 536 F. Supp. 931, 984 (E.D. Tex.) (three-judge court), vacated and remanded on other grounds, 456 U.S. 37 (1982) (per curiam). Throughout the 1980s, blacks and Hispanics had voted together to elect black representatives to Congress. St. Exh. 17, at 55-56.

By 1990, however, the coalition between blacks and Hispanics had begun to disintegrate. J.S. App. 22a-23a. The state legislature was aware in 1991 that black and Hispanic voters no longer voted together consistently, as several recent elections in Houston had demonstrated (Lawson Exh. 26; Pl. Exhs. 4C, 15H). At the outset of the 1991 redistricting, Hispanics in Harris County made clear that they opposed the creation of districts in which blacks and Hispanics were combined to form a majority. J.S. App. 23a. Hispanic leaders believed that the significant increase in Hispanic population during the 1980s justified the creation of a new Hispanic opportunity district in Harris County; they favored a plan that would create such a district while retaining a black opportunity district. *Id.* at 42a-43a. A consensus emerged in the legislature to support that proposal. *Id.* at 42a.

The minority populations in Harris County are sufficiently concentrated to permit the drawing of either one reasonably compact black opportunity district or one reasonably compact Hispanic opportunity district. J.A. 197-198 (black); J.A. 199-200 (Hispanic). It is unclear whether it was possible to draw both a reasonably compact black opportunity district and a reasonably compact Hispanic opportunity district simultaneously. The Owens-Pate plan set out to accomplish that result. Questions were raised, however, about the compactness of the black opportunity district that Owens-Pate provided. 2 Tr. 132. And the Hispanic opportunity district provided by that plan afforded significantly smaller opportunity for Hispanics to elect the representative of their choice than did the plan ultimately enacted by the state legislature. 4 Tr. 205. Nonetheless, the Owens-Pate plan would have provided blacks an opportunity to elect a representative of their choice in one district; it would have provided Hispanics with at least some opportunity to elect a

representative of their choice in another district; and the districts in that plan were much more compact than the districts ultimately enacted by the legislature. See Pl. Exh. 32a; J.S. App. 88a. As noted above, however, the Owens-Pate plan, which required incumbents to run against each other, was rejected.

As was the case with District 30 in Dallas County, political considerations significantly affected the ultimate shape of Districts 18 and 29. A logical way to reconfigure District 18 would have been to model it upon the majority-black state senate district in Harris County. J.S. App. 44a & n.29. A proposal to do that, however, was blocked by Mike Andrews, an incumbent Member of Congress from a majority-white district in Harris County, who would have lost a large part of his congressional district under that proposal. *Id.* at 44a. In addition, Craig Washington, then the incumbent Member of Congress for District 18, insisted that new District 18 move out of the Sunnyvale area of southern Harris County and into northern Harris County in order to avoid including an opposition candidate in his district. 4 Tr. 45-46.

Negotiations between Roman Martinez and Gene Green, state legislators who aspired to run for Congress in the new District 29, also influenced the shape of the two districts. J.S. App. 42a & n.27. Green wanted the new district to include a group of non-Hispanic voters who had voted for him as a state senator. *Id.* at 44a-45a. That required the drawing of highly irregular lines in order to capture sufficient additional Hispanic voters to retain the Hispanic population in the district that the legislature believed was necessary for Hispanics to have an opportunity to elect a candidate of their choice. *Id.* at 45a.

3. The Attorney General of the United States precleared the State's 1991 redistricting plan under Section 5 of the Voting Rights Act. J.A. 343-344. The State's plan

was then challenged by plaintiffs who alleged that it violated Section 2 of the Voting Rights Act and a constitutional prohibition against partisan gerrymandering. J.S. App. 16a-17a. In *Terrazas* v. *Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991) (three-judge court), aff'd, 112 S. Ct. 3019, 113 S. Ct. 29 (1992); 821 F. Supp. 1162 (W.D. Tex. 1993) (three-judge court), a federal district court rejected those claims.

Appellees then filed the present suit. Appellees are six Texas voters, five of whom live in the districts at issue on this appeal. J.S. App. 6a. They alleged that 24 of the State's 30 congressional districts, including the three districts at issue here, were the product of racial gerrymandering and lacked sufficient justification. *Id.* at 4a, 6a-7a. The district court permitted the United States, six African-American voters, the League of United Latin American Citizens, and seven Hispanic voters to intervene as defendants. *Id.* at 7a. After a trial, the district court concluded that Districts 18, 29, and 30 were unconstitutional. *Id.* at 4a-5a. The court upheld the 21 other districts challenged by appellees. *Id.* at 5a.

The district court held that redistricting is suspect under *Shaw* when it results in "bizarrely shaped districts whose boundaries were created for the purpose of racially segregating voters." J.S. App. 65a. Applying that test, the court held that the districts at issue here called for strict scrutiny. The court specifically found that the boundaries of District 30 in Dallas County were convoluted and were deliberately made that way to include a population that was 50% black. *Id.* at 77a-81a. The court also found that the lines dividing Districts 18 and 29 in Harris County appear "utterly irrational—unless one factors in the overlap between these district boundaries and the racial makeup of their underlying populations." *Id.* at 83a-84a. The court concluded that "[t]he goal of separating His-

panic and African-American residents from each other and from the white population for the purposes of voting led to the creation of [Districts 18 and 29]." *Id.* at 84a.

Applying strict scrutiny, the court found that none of the three districts was narrowly tailored to achieve a compelling state interest. The court stated that "[i]t is not obvious to this court that the State *justifiably* feared potential liability under § 2 or § 5 of the Voting Rights Act if it failed to protect District 18 and set aside [Districts 29 and 30] for minority Congressmen." J.S. App. 89a-90a (footnote omitted). In that regard, the court found that Districts 18, 29, and 30 do not satisfy the Section 2 compactness requirement set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). J.S. App. 89a n.54. Nevertheless, the court found that, "[to comply with the Voting Rights Act] and other reasons, the Legislature created the districts," and, "[a]ccording to *Shaw*, this is permissible if the districts are narrowly tailored to comply with Voting Rights Act concerns." *Id.* at 90a.

On the issue of narrow tailoring, the court held that, "[b]ecause a *Shaw* claim embraces the district's appearance as well as its racial construction, narrow tailoring must take both these elements into account." J.S. App. 91a. For that reason, the court concluded that, "to be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Ibid.* Because the court found that the State could have constructed alternative minority opportunity districts that were much more geographically compact than Districts 18, 29, and 30, the court concluded that those districts were not narrowly tailored to further the State's interest in complying with the Voting Rights Act. *Id.* at 92a-93a. The court rejected the contention that the State's interest in protecting incumbents was relevant to the narrow tailoring inquiry,

reasoning that the argument "implicitly equat[ed] incumbent protection with a compelling state interest." *Id.* at 91a. The court noted that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion." *Id.* at 69a.

4. On September 2, 1994, the district court entered an order permitting the 1994 elections to be held under the existing redistricting plan, but directing the State to prepare a new plan by March 15, 1995. J.S. App. 105a-106a. On September 20, 1994, the court entered an order amending the September 2 order so that it enjoined the use of the redistricting plan for the 1996 elections. *Id.* at 107a-108a. On December 23, 1995, this Court stayed the district court's orders pending disposition of the appeal.

SUMMARY OF ARGUMENT

The district court erred in holding that Districts 18, 29, and 30 do not satisfy strict scrutiny. Those districts are narrowly tailored to further Texas's compelling interests in complying with Section 2 of the Voting Rights Act and ameliorating the effects of racially polarized voting.

A. Texas had a compelling interest in drawing one black opportunity district in Dallas County and one black and one Hispanic opportunity district in Harris County in order to comply with Section 2 of the Voting Rights Act. Section 2 is a constitutional exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments and furthers the compelling interest in eliminating the effects of racial discrimination in voting. State compliance with Section 2 furthers that same compelling interest.

A State has a compelling interest in creating minority opportunity districts in order to comply with Section 2 when it has a firm basis in evidence for believing that such districts are required by that provision. Such a firm basis exists when (1) members of the minority group are suffi-

ciently numerous and concentrated to have the opportunity to elect candidates of their choice in a reasonably compact district; (2) the minority group is politically cohesive; (3) whites have engaged in significant bloc voting against minority-preferred candidates; and (4) the failure to create a minority opportunity district would leave minority group members substantially underrepresented when compared to their percentage in the relevant population. *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658 (1994). Texas had sufficient evidence to satisfy those requirements for the three districts challenged in this case.

The district court did not address that evidence. It held that, because the districts actually enacted in the State's plan do not satisfy the *Gingles* compactness requirement, Section 2 could not provide any justification for creating them. To have a compelling interest in complying with Section 2, however, the State was not required to show that the districts it actually drew satisfied the *Gingles* compactness requirement. The question at the compelling interest stage of the inquiry is whether reasonably compact minority opportunity districts could have been drawn. When such districts could have been drawn and there is a strong basis in evidence for the State to believe that the other preconditions are established, the State has a compelling interest in drawing minority opportunity districts in order to comply with Section 2. The question whether the State has furthered that interest in a constitutionally permissible manner is a question of narrow tailoring.

B. In addition to its interest in complying with the Voting Rights Act, the State also had a compelling interest in ameliorating the consequences of racial bloc voting attributable to past and present discrimination. The State was faced with persistent patterns of racially

polarized voting. It could create minority opportunity districts in order to ensure that racially polarized voting did not cause minority group members to be severely underrepresented.

C. Districts 18, 29, and 30 were narrowly tailored to further the State's two compelling interests. A State's plan is narrowly tailored if it uses racial considerations no more than is reasonably necessary in order to achieve its compelling interests. A State violates that standard if, in creating minority opportunity districts, it (1) creates more such districts than necesary to comply with the Voting Rights Act or to eliminate the effects of racially polarized voting; (2) packs substantially more minority voters than necessary into those districts; or (3) departs from its traditional districting criteria more than is necessary in order to satisfy its compelling or other legitimate redistricting interests. The districts at issue here did not violate any of those restrictions.

The district court held that the challenged districts are not narrowly tailored because the State could have drawn minority opportunity districts that were more compact. If the State had drawn those other districts, however, it would have had to sacrifice its strong traditional interest in protecting incumbents. In order to protect incumbents while achieving its compelling interest in creating minority opportunity districts, the State was required to draw irregularly shaped districts.

The district court's conclusion that *Shaw* requires a State to draw compact districts even if that means that the State cannot protect incumbents is incorrect and based on a misreading of *Shaw*. The district court's conclusion conflicts with this Court's repeated holdings that federal courts must not substitute their own redistricting preferences for those of the States. It also seriously under-

mines Congress's goal of encouraging voluntary compliance with Section 2.

Because the district court applied incorrect legal standards, its judgment should be reversed or, alternatively, the decision should be vacated and the case remanded for a decision under the correct legal standards.

ARGUMENT

Introduction

In their briefs, the State of Texas and the Lawson/LULAC intervenors argue that the lower court erred in its decision to apply strict scrutiny to the congressional districts at issue on this appeal. In *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), this Court held that strict scrutiny is required if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Id.* at 2488. Plaintiffs will satisfy this "demanding" threshold standard only where they can "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497 (O'Connor, J., concurring).

The decision below that strict scrutiny was applicable here was made before the *Miller* decision and the district court did not have the benefit of the *Miller* opinion in making that judgment. The record in this case shows that protection of incumbents is a customary and traditional Texas redistricting practice, and the district court found that incumbency protection played an important role in the final shape of the challenged districts. The district court nevertheless refused to consider as legally significant

whether and to what extent incumbency protection explained the challenged districts (J.S. App. 66a-72a). That refusal was inconsistent with *Miller*.

This Court, however, need not reach the question whether strict scrutiny was applicable here, because the district court's ruling must be reversed in any event. As we show below, the district court made significant legal errors in applying strict scrutiny to the facts of this case. Had the district court applied strict scrutiny correctly, it would have concluded that the challenged districts are constitutional regardless of whether strict scrutiny was applicable. The Court can dispose of the case on that basis. See *United States* v. *Paradise*, 480 U.S. 149, 166-167 (1987) (plurality opinion) (declining to decide whether court-ordered race-conscious relief was subject to strict scrutiny since the relief ordered satisfied such scrutiny).

THE STATE'S REDISTRICTING PLAN SATISFIES STRICT SCRUTINY

This Court recently went out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2117 (1995). In doing so, the Court recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Ibid.* Accordingly, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional restraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Ibid.* The minority opportunity districts at issue in this case are narrowly tailored to further Texas's compelling interests in complying with Section 2 of the Voting

Rights Act and in ameliorating the effects of persistent racially polarized voting.

A. The State Had A Compelling Interest In Drawing One Black Opportunity District In Dallas County And One Black And One Hispanic Opportunity District In Harris County In Order To Comply With Section 2 Of The Voting Rights Act

1. The State drew Districts 18, 29, and 30 in order to comply with Section 2 of the Voting Rights Act. In *Miller* v. *Johnson*, 115 S. Ct. 2475, 2490-2491 (1995), the Court left open the question whether compliance with the Voting Rights Act, standing alone, provides a compelling justification for governmental action. The background to the enactment of Section 2 and this Court's prior cases answer that question and demonstrate that a State has a compelling interest in complying with Section 2.

Congress adopted the Voting Rights Act in 1965 "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). After a thorough investigation, Congress determined that earlier attempts to remedy racial discrimination in voting had failed because of "unremitting and ingenious defiance of the Constitution" in some parts of the country. *Id.* at 309. Congress therefore adopted "sterner and more elaborate measures," *ibid.*, including Section 5's requirement that covered jurisdictions preclear their voting changes with federal officials and Section 2's requirement that all jurisdictions avoid abridgements of the right to vote on the basis of race. *Id.* at 315-316.

When it subsequently extended the Voting Rights Act in 1982, Congress concluded that its provisions continued to be necessary in order to prevent voting discrimination.

See S. Rep. No. 417, 97th Cong., 2d Sess. 9-10 (1982). At that time, Congress heard evidence that minority group members continued to experience direct impediments to voting, including physical intimidation of voters and candidates, reregistration requirements, voter purges, changes in the location of polling places, and inconvenient voting and registration hours. *Id.* at 10 n.22 (citing testimony from House and Senate hearings). Congress also heard evidence that, between 1970 and 1980, discrimination in voting had become much more sophisticated and involved purposeful efforts to dilute minority voting strength through such practices as annexations, the use of at-large elections, majority vote requirements, numbered places, and the shifting of district boundary lines. *Id.* at 10. Finally, Congress was presented with "overwhelming evidence" that racial politics continued to dominate the political process in some communities. *Id.* at 33-34.

In response to those continuing threats to minority voting rights, Congress extended Section 5 of the Act and amended Section 2 to prohibit voting practices that have discriminatory "results." 42 U.S.C. 1973(a). Congress provided that discriminatory results occur when minority group members have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Congress recognized that compliance with that new statutory prohibition would sometimes require taking race into account in drawing district lines. S. Rep. No. 417, *supra*, at 30-34. Congress believed, however, that such a prohibition was necessary; it concluded that prohibiting practices with discriminatory results was essential to prevent intentional discrimination that would otherwise "go undetected, uncorrected and undeterred" because of the inordinate difficulty of proving a discriminatory purpose. *Id.* at 36,

40. Congress also concluded that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.* at 40. Congress's conclusions were supported by abundant evidence. As one court has stated, "[e]mpirical findings by Congress of persistent abuses of the electoral process, and the apparent failure of the intent test to rectify those abuses, were meticulously documented and borne out by ample testimony." *Major* v. *Treen*, 574 F. Supp. 325, 347 (E.D. La. 1983) (three-judge court). Congress therefore enacted the amendment to Section 2 to further its compelling interest in eliminating racial discrimination and its effects. See *Adarand*, 115 S. Ct. at 2117; *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 503-504, 509 (1989); *United States* v. *Paradise*, 480 U.S. 149, 167 (1987) (opinion of Brennan, J.); *id.* at 186 (Powell, J., concurring); *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 480 (1986) (opinion of Brennan, J.); *id.* at 485 (Powell, J., concurring); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983).

This Court's decisions firmly establish that Congress had authority under the Constitution to enact the 1982 amendment to Section 2. This Court has made clear that, even though the Fourteenth and Fifteenth Amendments themselves prohibit only intentional discrimination, Congress has broad authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to ban voting practices that have discriminatory effects. *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980) (upholding Section 5 prohibition against retrogressive voting changes); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding ban on use of literacy tests as applied to citizens educated in Puerto Rico); *South Carolina* v. *Katzenbach*,

383 U.S. at 334 (upholding the suspension of literacy tests in certain jurisdictions). In particular, Congress may proscribe voting practices with discriminatory effects when they either pose a "risk of purposeful discrimination" or "perpetuate[] the effects of past discrimination." *City of Rome*, 446 U.S. at 176, 177; *South Carolina* v. *Katzenbach*, 383 U.S. at 334. Congress concluded that both of those dangers were present here. The amendment to Section 2 therefore falls within Congress's broad powers to enforce the Fourteenth and Fifteenth Amendments. *Jones* v. *City of Lubbock*, 727 F.2d 364, 372-375 (5th Cir. 1984) (upholding the constitutionality of Section 2); *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1556-1563 (11th Cir. 1984) (same).

The principles underlying the Court's decisions in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), and *Miller* v. *Johnson*, *supra*, do not cast doubt upon the constitutionality of Section 2. The Court explained in *Shaw* and *Miller* that government action that "separate[s] its citizens into different voting districts on the basis of race" is suspect because it may be based on "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 115 S. Ct. at 2486 (quoting *Shaw*, 113 S. Ct. at 2827). Section 2 makes no such assumptions. *Gingles*, 478 U.S. at 46. It requires race-based districting only when there is empirical evidence that minority voters in the particular area are *in fact* politically cohesive and that the majority *in fact* usually votes as a bloc to defeat the minority's preferred candidates. *Growe* v. *Emison*, 113 S. Ct. 1075, 1085 (1993). Section 2 therefore does not require a State to act on the basis of the stereotypes that *Shaw* and *Miller* condemn.

Because Section 2 is a constitutional exercise of Congress's authority to eliminate racial discrimination and its effects, state compliance with its requirements furthers that same compelling interest. Thus, when Section 2 requires the drawing of minority opportunity districts, the State has a compelling interest in drawing such districts.

2. In order to show that it had a compelling interest in drawing minority opportunity districts so as to satisfy Section 2, a State is required to show that it had "a strong basis in evidence of the harm being remedied." *Miller*, 115 S. Ct. at 2491; *Croson*, 488 U.S. at 500. That standard is satisfied by evidence that provides a "reasonable basis to believe" that the failure to create the districts would violate Section 2. *Miller*, 115 S. Ct. at 2492.

The "strong basis in evidence" standard ensures that government actors engaging in race-conscious activity do so only for well-founded reasons. See *Johnson* v. *Transportation Agency*, 480 U.S. 616, 652-653 (1987) (O'Connor, J., concurring in the judgment); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 290-291 (1986) (O'Connor, J., concurring in part and concurring in the judgment). At the same time, it promotes voluntary compliance with the law by giving States a margin of safety against the "competing hazards" of liability to minorities if they do not create minority opportunity districts and liability to others if they do. *Id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment). The need to provide such a margin of safety is particularly strong in redistricting, for "the States must have discretion to exercise the political judgment necessary to balance competing interests" in the districting process. *Miller*, 115 S. Ct. at 2488.

3. This Court has not yet decided what constitutes a strong basis in evidence for a State's belief that Section 2 requires it to draw minority opportunity districts. This

Court's Section 2 cases, however, furnish substantial guidance on that issue. In *Gingles*, the Court held that plaintiffs challenging multimember districts under Section 2 must establish three preconditions: that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * * —usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. The Court has subsequently held that those same preconditions apply to challenges to single-member district plans. See *Growe*, 113 S. Ct. at 1084. After establishing the three *Gingles* preconditions, plaintiffs must also prove vote dilution from the totality of circumstances. *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2657-2658 (1994).

In *DeGrandy*, the Court held that, in a single-member district case, the compactness and numerosity precondition "requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 114 S. Ct. at 2655. The Court left open the question which characteristics of the minority population are relevant in deciding whether the minority group could constitute a majority (*e.g.*, age, citizenship). *Id.* at 2655-2656. It also left open the related question whether the first precondition can be satisfied by proof that the minority group could constitute a sizable minority (rather than a majority) in a district and could elect candidates of its choice by attracting some cross-over votes. *Id.* at 2656. Those questions had been reserved in prior cases as well. See *Growe*, 113 S. Ct. at 1083 n.4 (noting that lower courts have looked to voting population rather than to total population to determine whether the

minority could constitute a majority and that *Gingles* refers to voting population, but reserving the question); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1154-1155 (1993) (reserving question whether minority that could not constitute a majority but could nevertheless elect candidates of its choice in an alternative district can state a Section 2 claim); *Growe*, 113 S. Ct. at 1084 n.5 (same); *Gingles*, 478 U.S. at 46 n.12 (same).

In *DeGrandy*, the Court also made clear that the presence or absence of "substantial proportionality" between the number of majority-minority districts and minority members' share of the relevant population is a significant factor in assessing the totality of circumstances. 114 S. Ct. at 2658; *id.* at 2664 (O'Connor, J., concurring) (proportionality is always relevant to a vote dilution claim, but never dispositive). If a State's plan affords substantial proportionality, it may be difficult for plaintiffs to establish that they have been denied an equal opportunity to participate and elect representatives of their choice. *Id.* at 2658-2659. On the other hand, evidence that a State's plan leaves minority group members substantially underrepresented when compared to their percentage in the relevant population may provide strong evidence of vote dilution. *Id.* at 2664 (O'Connor, J., concurring).

In light of *Gingles* and *DeGrandy*, and the continuing uncertainty concerning a State's precise Section 2 obligations, a State has a strong basis in evidence for believing that Section 2 requires it to create minority opportunity districts when: (1) members of the minority group are sufficiently numerous and concentrated to have the "potential to elect" candidates of their choice in a reasonably compact district (even if they would not constitute an absolute voting majority), *Gingles*, 478 U.S. at 50 n.17; (2) the minority group is politically cohesive; (3)

whites engage in significant bloc voting; and (4) the failure to create a minority opportunity district would leave minority group members substantially underrepresented when compared to their percentage in the relevant population. There may be other circumstances in which the State could demonstrate a firm basis in evidence for creating minority opportunity districts, but proof of those four factors ordinarily will be sufficient. A State cannot be expected to make the same totality-of-the-circumstances inquiry at the time it redistricts that a court is able to make after an adversary trial. Nor should the State be prevented from resolving uncertain Section 2 issues in favor of the reading that is more, rather than less, protective of minority voting rights.

4. Texas had a strong basis in evidence for believing that Section 2 required it to draw one black opportunity district in Dallas County and one black and one Hispanic opportunity district in Harris County.

a. In Dallas County, it was possible to draw a reasonably compact district with a sufficiently large black population to provide black voters an opportunity to elect the candidates of their choice. Then-state Senator Eddie Bernice Johnson presented to the legislature a plan containing such a district centered in South Dallas with a 44% black population. J.A. 139. The district court found that Johnson's district was "truly compact and contiguous" because it was located in a compact geographical area, kept identifiable neighborhoods intact, and did not split precincts. J.S. App. 78a. The evidence also showed that Johnson's district would have afforded blacks an opportunity to elect a representative of their choice. 5 Tr. 21; J.A. 234 & n.21. The Owens-Pate plan considered by the legislature also contained a reasonably compact black opportunity district. J.A. 141. The existence of those two alternative districts established that the State had a

strong basis for believing that the first *Gingles* precondition would be satisfied if it failed to draw a black opportunity district in Dallas County.

Texas also had a strong basis for believing that the second and third *Gingles* preconditions—black cohesion and white bloc voting—were satisfied in Dallas County. The State acted against the backdrop of a long history of judicial findings that polarized voting has existed in Dallas County. See, *e.g.*, *White* v. *Regester*, 412 U.S. 755, 765-767 (1973); *Lipscomb* v. *Wise*, 399 F. Supp. 782, 785-786 (N.D. Tex. 1975), rev'd, 551 F.2d 1043 (5th Cir. 1977), rev'd, 437 U.S. 535 (1978). Indeed, just one year prior to the 1991 redistricting, a federal district court invalidated the election scheme for the Dallas City Council under Section 2, finding, on the basis of an exhaustive analysis, that black voters in Dallas were politically cohesive and that white bloc voting usually defeated the candidates preferred by blacks. *Williams* v. *City of Dallas*, 734 F. Supp. 1317, 1387-1394 (N.D. Tex. 1990). Expert testimony presented by the State in the present case confirmed the existence of racially polarized voting in Dallas County both in the areas covered by District 30 and in the areas not included in that district. 4 Tr. 187; see also J.A. 227. Legislators involved in redistricting were aware of the findings in *Williams* and of the persistence of racially polarized voting in Dallas County. Lawson Exhs. 7, 11; J.A. 251.

Finally, if the State had not drawn a black opportunity district in Dallas County, blacks in that area would have been very substantially underrepresented when compared to their percentage of the Dallas County population. Even though blacks constitute 20% of the Dallas County population and the Dallas County population is sufficient to support three and one-third congressional districts, blacks in Dallas County would not have been able to elect a single representative of their choice. See pp. 6, 7-9, *supra*.

The State therefore had a strong basis in evidence for its belief that Section 2 required it to create a black opportunity district in Dallas County.[2]

b. The State also had a strong basis for believing that Section 2 required it to draw one black and one Hispanic opportunity district in Harris County. The State presented evidence that black voters in Harris County were sufficiently numerous and concentrated to allow the drawing of one reasonably compact black opportunity district. See J.A. 197-198. Likewise, the State's evidence showed that it was possible to draw a reasonably compact Hispanic opportunity district in Harris County. See J.A. 199-200. Because many concentrations of black voters in Harris County are in close proximity to concentrations of Hispanic voters, those two hypothetical districts overlap. Given those demographic patterns, it is unclear whether the State could have drawn both a reasonably compact black opportunity district and a reasonably compact Hispanic opportunity district simultaneously.

Notwithstanding that uncertainty, Texas had a strong basis in evidence for concluding that both minority groups satisfied the first *Gingles* precondition. Section 2 protects

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[2] A federal district court held in 1984 that a plan that failed to draw a majority-black congressional district in Dallas did not violate Section 2. See *Seamon* v. *Upham*, No. P-81-49-CA (E.D. Tex. Jan. 30, 1984). The court relied on evidence that black voters had "significant influence" on elections in the majority-white districts in southern Dallas County. Slip op. 15-16. At the time of the 1980 redistricting, however, Dallas County supported less than three districts. U.S. Exh. 1085. Moreover, *Seamon* was decided before the district court had issued its decision in *Williams* on the extent of racial polarization in Dallas County. The legislature was entitled to take into account the fact that the Dallas County population now supports three and one-third districts and to rely on the more recent *Williams* findings in concluding that Section 2 now requires a black opportunity district.

all racial minority groups and provides States with no clear basis on which to choose which of two similarly situated minority groups to protect from dilution. If the State had drawn only a black opportunity district, it would have been vulnerable to a Section 2 suit brought by Hispanics; if it had drawn only an Hispanic opportunity district, it would have been vulnerable to a suit brought by blacks. In that situation, rather than arbitrarily preferring one group over the other, the State reasonably concluded that its Section 2 responsibilities required it to provide both black and Hispanic voters an opportunity to elect their preferred candidates—even if that required a departure from compactness.

The State had a strong basis to believe that the second and third *Gingles* preconditions were satisfied in Harris County as well. The State's expert, Dr. Lichtman, concluded that elections in what is now District 29 were the "most extremely polarized" of any he examined—Hispanic voters voted for Hispanic candidates 89% of the time, and Hispanic candidates received only a 5% crossover from white voters. 4 Tr. 186-187. The area now covered by District 18 also exhibited a high degree of polarization between black and white voters. 4 Tr. 187-188; see also J.A. 225-227. Legislators involved in redistricting were well aware of the history of racially polarized voting in Harris County. J.A. 251.

The legislators involved in redistricting were also aware that the black/Hispanic coalition in Harris County—which had previously enabled black and Hispanic voters to elect the candidate of their choice in the 18th District—had begun to disintegrate. As the district court noted (J.S. App. 22a-23a), the breakdown of the black/Hispanic coalition had exhibited itself in a series of divisive local elections beginning in 1989. J.A. 251; Lawson Exh. 26. Dr. Lichtman's analysis confirmed that "His-

panic and black voters did not usually both provide majority support for minority candidates." J.A. 228-229. Texas therefore had a strong basis for concluding that black voters would lack an opportunity to elect representatives of their choice in a district designed to afford Hispanics such an opportunity and that Hispanics would lack an opportunity to elect candidates of their choice in a district designed to afford blacks such an opportunity. In contrast to the situation during the previous decade, only by drawing two minority opportunity districts in Harris County could the State in 1991 afford each group an opportunity to elect a representative of its choice.

Finally, if the State had not drawn either an Hispanic or a black opportunity district in Harris County, blacks and Hispanics in Harris County would have been very substantially underrepresented when compared to their percentage in the Harris County population. Hispanics make up approximately 23% of the Harris County population and blacks make up approximately 19% of the Harris County population, and the population of Harris County is sufficient to support five districts. Nevertheless, neither group would have had an opportunity to elect a representative of its choice if no minority opportunity districts were drawn. See pp. 6, 9-11, *supra*. The evidence therefore establishes each of the prerequisites necessary to support the conclusion that Texas had a compelling interest in drawing one black and one Hispanic opportunity district in Harris County.

5. The district court did not purport to decide whether Texas had a strong basis in evidence for its conclusion that Section 2 required it to draw one black opportunity district in Dallas County and one black and one Hispanic opportunity district in Harris County. J.S. App. 86a-93a. The district court held instead that, because the districts actually drawn by the State do not satisfy the *Gingles*

compactness requirement, Section 2 could provide no justification for drawing those districts. *Id.* at 89a n.54. That reasoning is seriously flawed. For a State to invoke its compelling interest in creating minority opportunity districts in order to comply with Section 2, there must be evidence that reasonably compact districts could have been drawn. A State is not required, however, to enact a plan that incorporates the geographically compact districts that led it to conclude that Section 2 required it to create minority opportunity districts in the first place. *Shaw* v. *Hunt*, 861 F. Supp. 408, 454 n.50 (E.D.N.C. 1994) (three-judge court), probable juris. noted, 115 S. Ct. 2639 (1995). The district court's contrary view reflects a basic misunderstanding of the *Gingles* compactness requirement.

Gingles held that Section 2 plaintiffs must show that a reasonably compact district can be drawn in order to establish a violation of that provision. 478 U.S. at 50. Absent such a showing, the Court held, plaintiffs cannot show that the discriminatory aspects of the existing election system have caused their inability to elect candidates of their choice. *Id.* at 50 n.17. *Gingles* did not hold, however, that States are required to remedy violations of Section 2 by drawing compact districts. Nor does the statute impose such a requirement. Section 2 prohibits the denial of an equal opportunity to elect representatives of choice. See 42 U.S.C. 1973(b). So long as a State's plan provides that opportunity, Section 2 obligations are satisfied; for Section 2 purposes, it does not matter whether the State satisfies its statutory obligations by utilizing compact or noncompact districts. See *Upham* v. *Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (federal court must defer to a State's remedial plan so long as it satisfies the substantive requirements of federal law); cf. *McGhee* v. *Granville County*, 860 F.2d 110, 120-121 & n.11 (4th Cir. 1988) (county may remedy violation of

Section 2 caused by multimember districts by increasing the size of the body or through limited voting scheme).

Thus, at the compelling interest stage of the inquiry, the relevant question under *Gingles* is whether reasonably compact minority opportunity districts could have been drawn. When such districts could have been drawn and the other preconditions for a strong basis in evidence are also established, the State has a compelling interest in drawing minority opportunity districts in order to comply with Section 2. The question whether the districts the State then draws to further that interest are drawn in a permissible way is a question of narrow tailoring. Because reasonably compact minority opportunity districts could have been drawn in Dallas and Harris Counties and the other relevant preconditions for a strong basis in evidence were established, Texas had a compelling interest in drawing minority opportunity districts in order to comply with Section 2.

B. The State Also Had A Compelling Interest In Drawing One Black Opportunity District In Dallas County And One Black And One Hispanic Opportunity District In Harris County In Order To Counteract The Effects Of Racially Polarized Voting

The State's decision to draw three districts in Dallas and Harris Counties in which minority voters would have an opportunity to elect the candidates of their choice was supported by an additional compelling interest: the interest in ameliorating the effects of racially polarized voting attributable to past and present racial discrimination. This Court has recognized that, even absent a federal statutory duty, a State has a compelling interest in taking race-conscious action to remedy identified discrimination within its jurisdiction if it has a strong basis for believing that its action is necessary to

achieve that remedial purpose. See *Adarand*, 115 S. Ct. at 2117; *Croson*, 488 U.S. at 491-493, 509 (opinion of O'Connor, J.). Thus, a State has a compelling interest in eliminating the effects of racially polarized voting attributable to past and present discrimination, even when the Voting Rights Act does not require such action.

Texas has a long history of racial discrimination in voting and districting. After the close of Reconstruction, the state legislature drew district lines in predominantly black counties in a manner designed to minimize the effects of black votes in legislative and judicial elections. St. Exh. 17, at 4. At the turn of the Twentieth Century, Texas instituted a poll tax, which remained in place until it was struck down by a federal court in 1966. *Texas* v. *United States*, 384 U.S. 155 (1966) (per curiam); see St. Exh. 17, at 13. Texas replaced the poll tax with a system requiring annual voter registration; the new system was then itself invalidated by a federal court. *Beare* v. *Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971) (three-judge court), aff'd *sub nom. Beare* v. *Briscoe*, 498 F.2d 244 (5th Cir. 1974); see J.A. 359; St. Exh. 17, at 13. Texas also maintained a whites-only primary system for over half of this Century; the State abandoned that system only after four separate decisions of this Court invalidated different forms of that system. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); see J.A. 359; St. Exh. 17, at 5-12. In 1973, this Court upheld a district court's conclusion that a state-wide legislative reapportionment employing multimember districts purposefully diluted black and Hispanic voting strength in violation of the Fourteenth Amendment. *White* v. *Regester*, 412 U.S. 755. Since that decision, courts have found that various levels of state government have diluted black and Hispanic voting strength in violation of Section

2. St. Exh. 17, at 18-23. And as recently as 1991, Texas's redistricting plan for the State House of Representatives deliberately fragmented and packed the Hispanic population in certain areas of the State, which led the Attorney General to interpose an objection under Section 5. J.A. 365-366.

Texas could reasonably believe that the significant racial polarization present in the State is, at least in part, a consequence of that long and deplorable history of voting discrimination. The State could also have reasonably believed that the persistent and severe pattern of racially polarized voting was "circumstantial evidence of racial bias operating through the electoral system to deny minority voters [in Dallas and Harris Counties] equal access to the political process." *Nipper* v. *Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc) (plurality opinion), cert. denied, 115 S. Ct. 1795 (1995). When a State has "essentially become a 'passive participant' in a system of racial exclusion practiced" by private parties within its jurisdiction, it may "take affirmative steps to dismantle such a system." *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.). As Justices White, Stevens, and then-Justice Rehnquist observed in applying that principle to the redistricting context, a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 167 (1977) (opinion of White, J.). In such circumstances, a State may take steps to ensure that minority group members are not substantially underrepresented when compared to their percentage in the relevant population. *Ibid.* Thus, even if it had not been possible to satisfy the *Gingles* compactness requirement in Dallas and Harris Counties, the drawing of three minority opportunity districts would have served Texas's

compelling interest in countering the effects of racial polarization at the polls.

The district court discounted that compelling interest because it found "no evidence" that the State drew the challenged districts in order to "eradicat[e] particular instances of racial inequality." J.S. App. 89a n.53. The district court misapprehended the legal significance of the evidence before it. As the district court itself noted, the record before it contained ample evidence that Texas felt compelled to draw minority opportunity districts as a remedy for the consistent racially polarized voting in Dallas and Harris Counties. *Id.* at 9a. Racial polarization that leaves minority group members severely under-represented when compared to their percentage in the population is an "instance[] of racial inequality" that the State has a compelling interest in remedying.

C. Districts 18, 29, And 30 Are Narrowly Tailored To Achieve The State's Compelling Interests

1. In *Shaw* v. *Reno*, this Court held that a plan is not narrowly tailored if it goes "beyond what [is] reasonably necessary" to achieve the State's compelling interests. 113 S. Ct. at 2831. The Court did not fully elaborate on the meaning of that standard. In cases involving employment goals and public contracting set asides, however, the Court has set forth several factors that are relevant to the narrow tailoring inquiry in those areas. See *Adarand*, 115 S. Ct. at 2118; *Croson*, 488 U.S. at 507-508; *Paradise*, 480 U.S. at 171 (opinion of Brennan, J.); *id.* at 187 (Powell, J., concurring). Those factors include: the efficacy of alternative remedies, the flexibility and duration of the remedy, the relationship of a remedial goal to the proportion of minority group members in the relevant labor pool, and the impact of the remedy on third parties. *Id.* at 171 (opinion of Brennan, J.).

Those principles suggest three narrow tailoring requirements in the present context. First, a State may not create more minority opportunity districts than required by the State's interest in complying with the Voting Rights Act or eliminating the effects of racial polarization. See *Shaw* v. *Hunt*, 861 F. Supp. at 446; *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1207 (W.D. La. 1993) (three-judge court), vacated and remanded on other grounds, 114 S. Ct. 2731 (1994). Thus, when the State draws districts along racial lines, it must do so only to the extent required by its compelling interests and not for reasons of "simple racial politics." *Shaw* v. *Reno*, 113 S. Ct. at 2824.

Second, a State may not "pack" minority voters by creating districts that "contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a reasonable opportunity to elect representatives of their choice in those districts." *Shaw* v. *Hunt*, 861 F. Supp. at 446; accord *Hays*, 839 F. Supp. at 1207. That requirement ensures that voters are not treated on the basis of race any more than is necessary to meet the State's compelling interests. See *Miller*, 115 S. Ct. at 2485-2486; *Shaw* v. *Reno*, 113 S. Ct. at 2828.

Finally, consideration must be given to the extent to which the districts drawn by a State substantially depart from its customary redistricting practices. Just as substantial departures from traditional redistricting practices may signal that race is the predominant motive in a State's redistricting plan, see *Miller*, 115 S. Ct. at 2486, so too such substantial departures may show that the State has given race more of a role in shaping districts than is necessary to meet its compelling interests. Thus, when a district substantially departs from a State's traditional districting principles, the State may be required to counter the inference that race was given a greater role

than necessary by showing that the boundaries utilized were necessary either to achieve its compelling interest or to achieve its compelling interest while simultaneously achieving other legitimate redistricting goals.

Texas's plan is narrowly tailored under those principles. The plan creates no more than the number of minority opportunity districts in Harris and Dallas Counties required by Section 2 and necessary to counteract the effects of polarized voting and prevent severe underrepresentation of blacks and Hispanics in those Counties.

The State's plan does not needlessly pack minorities into the challenged districts. The two black opportunity districts contain bare black population majorities. St. Exh. 14. And while the Hispanic opportunity district has a 60.6% Hispanic population, that district is only 42.5% Hispanic in citizen voting-age population. *Ibid.* Although the State might possibly have constructed districts with somewhat lower minority percentages and still have provided the relevant minority groups an opportunity to elect representatives of their choice, a State is not required to act with mathematical precision in fulfilling its compelling interests. Particularly at the time of redistricting, a State can only roughly calculate what may be necessary. A State may also properly seek to provide some margin of safety in case its estimates prove faulty. The districts drawn by Texas in this case contain minority percentages that are well within the range of what the State could reasonably have thought appropriate to ensure a meaningful opportunity to elect. See *Ketchum* v. *Byrne*, 740 F.2d 1398, 1413, 1417 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Jeffers* v. *Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990) (three-judge court), aff'd mem., 498 U.S. 1019 (1991).

The challenged districts are more irregular in shape than districts previously drawn in Texas. Those irregularities, however, were necessary to create districts that furthered the State's compelling interest in creating minority opportunity districts while at the same time serving the State's interest in protecting incumbents Bryant and Frost (and potential candidate Johnson) in Dallas County and incumbent Andrews (and potential candidates Green and Martinez) in Harris County. See pp. 7-9, 11, *supra*. Because of the importance that the State attached to protecting incumbents (and aspiring candidates from the state legislature), the State could not have advanced its compelling interest in creating minority opportunity districts except by drawing irregularly shaped districts.

2. The district court nonetheless concluded that Districts 18, 29, and 30 were not narrowly tailored. The court held that, "to be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." J.S. App. 91a. It reasoned that, "[b]ecause a *Shaw* claim embraces the district's appearance as well as its racial construction, narrow tailoring must take both these elements into account." *Ibid.* Under the court's approach, a State must not only demonstrate a compelling interest for creating a minority opportunity district, but it must also demonstrate a separate compelling justification for drawing an irregular minority opportunity district. *Ibid.* Noting that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion," *id.* at 69a, the district court then held that protecting incumbents is not the kind of compelling interest that the State may pursue at the expense of compactness, *id.* at 68a-69a, 88a, 91a. Because the court concluded that the State could have drawn substantially more compact

minority opportunity districts, and because the court rejected incumbency protection as a permissible basis for departing from compactness, the court held that the three districts at issue here were not narrowly tailored. *Id.* at 86a-93a. That conclusion was incorrect for several reasons.

a. First, the court's view that a *Shaw* claim embraces a district's appearance as well as its racial composition is based on a misunderstanding of the nature of a *Shaw* claim. This Court held in *Miller* that "[s]hape is relevant [to a *Shaw* claim] not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 115 S. Ct. at 2486. There is therefore no basis for the district court's holding that a State is required to provide a compelling justification for a district's appearance as well as its racial composition. The district court's rule " 'confuse[s] the purpose of *Shaw*'s strict scrutiny standard,' which is not to ensure that the state creates wise or aesthetically-pleasing districts, but to ensure that it 'is not covertly pursuing forbidden ends' when it draws district lines." *Shaw* v. *Hunt*, 861 F. Supp. at 451.

As we have discussed, a district's irregular appearance may signal that race has been given greater weight than necessary to further a State's compelling interest. A State may have to counter that inference by showing that its approach was necessary to further the State's compelling interest in creating minority opportunity districts while protecting other legitimate redistricting interests at the same time. But that is very different from requiring the State to provide an *additional compelling*

justification for its decision to draw irregularly shaped districts.

b. Second, by holding that Texas could not pursue its desire to protect incumbents at the expense of creating compact districts, the district court usurped the State's power to determine its own redistricting priorities. "It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Miller*, 115 S. Ct. at 2488 (quoting *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975)); see also *Voinovich*, 113 S. Ct. at 1156-1157; *Growe*, 113 S. Ct. at 1081. Redistricting is a "highly political task," *id.* at 1080, and decisions concerning which districting criteria to apply involve essentially political "choices about the nature of representation," *Burns* v. *Richardson*, 384 U.S. 73, 92 (1966). Unless a state redistricting plan violates the Constitution or a federal statute, federal courts must defer to state reapportionment policy, no matter how unwise that policy may appear to be. See *Upham*, 456 U.S. at 42 (per curiam).

Consistent with those principles, a State may legitimately seek to protect incumbents in redistricting and may permissibly conclude that furthering that interest is more important to it than drawing compact districts. This Court's decision in *White* v. *Weiser*, 412 U.S. 783 (1973), is particularly instructive on that point. In *Weiser*, the Court held that a lower court had erred in imposing as a remedy for a one-person, one-vote violation a redistricting plan that disregarded the State's policy of incumbency protection in order to create compact districts. *Id.* at 793-797. Explaining that the State had made the political decision that protecting incumbents was a more important state interest than maintaining compact districts, the Court held that "the District Court's preferences do not override whatever state goals were embodied in" the State's plan. *Id.* at 796. The district court's holding in

this case that Texas could not give greater weight to incumbency protection than it gave to compactness conflicts with *Weiser*, as well as with other cases resting on the same basic principle of federalism. See *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983) ("avoiding contests between incumbent Representatives" is a legitimate State redistricting policy); *Gaffney* v. *Cummings*, 412 U.S. 735, 751-754 & n.18 (1973) (State may draw irregular district lines, splitting political subdivisions, in order to allocate seats to major political parties in proportion to their statewide strength); *Burns*, 384 U.S. at 89 n.16 (State may draw district lines to avoid contests between incumbents).

c. The district court's approach to the issue of narrow tailoring also undermines the goal of encouraging voluntary compliance with the law. As a practical matter, many jurisdictions may be unwilling to meet their obligations under Section 2 voluntarily if they must sacrifice what they deem to be an important policy of protecting incumbents in order to do so. This case is a good example. The district court found that, in order to protect incumbents, district boundaries throughout Texas frequently "divided counties, cities, neighborhoods, and regions." J.S. App. 68a. Incumbency protection is responsible for the fact that at least two Texas districts that are overwhelmingly white in composition are as irregularly shaped as the districts at issue here. Lawson J.S. 4-5. In its 1991 redistricting, Texas did what it took to protect incumbents. J.S. App. 68a. If relatively compact districts provided such protection, compact districts were drawn. If substantial departures from compactness were needed to protect incumbents, that was done as well. And if extreme departures from compactness were required, even extreme departures were utilized. A State that has undertaken such strong efforts to protect incumbents is

unlikely voluntarily to abandon that concern in order to comply with Section 2.

The district court's narrow tailoring approach fails to take that political reality into account. If Congress's purposes are to be advanced, however, a State should not be forced to choose between creating minority opportunity districts in order to comply with Section 2 and protecting incumbents. A State should instead be permitted to accomplish both goals simultaneously, even if that means that highly irregular districts will be drawn. The district court's contrary view is "at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment).

d. The district court's use of district shape in applying the narrow tailoring requirement also raises serious equal protection concerns. Under the district court's standard, a State is free to depart from principles of compactness whenever it chooses—except when it wishes to further a compelling interest in avoiding the dilution of minority voting strength. That result seriously distorts the purposes of the Equal Protection Clause. "[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks." *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring). A State that has, over time, systematically given greater weight to incumbency protection than to compactness in districting decisions should not be precluded from following the same course when it decides to further its compelling interest in complying with Section 2.

3. The district court sought to cast doubt on the legitimacy of the State's pursuit of incumbency protection on three grounds. None is persuasive.

First, the district court sought to distinguish this Court's cases recognizing the legitimacy of incumbency protection on the ground that Texas had pursued that goal in a particularly aggressive manner. J.S. App. 67a-68a. The court stated that "never before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents." *Ibid.* The court found it particularly objectionable that "[t]he Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts." *Id.* at 68a. According to the court, "[t]he final result seems not one in which the people select their representatives, but in which the representatives have selected the people." *Ibid.*

Texas's zeal in protecting incumbents may raise serious policy concerns. In light of *Weiser*, however, there is no basis in the Constitution for rejecting the kind of incumbency protection practiced in this case. Texas may not be acting wisely in believing that protecting incumbents is more important than other districting considerations. But those are precisely the kinds of "choices about the nature of representation" (*Burns*, 384 U.S. at 92) that are entrusted to States under the Constitution. A federal district court may not usurp that state function under the guise of conducting a narrow tailoring inquiry.

Second, the district court characterized the United States' argument as "implicitly equating incumbent protection with a compelling state interest." J.S. App. 91a. The United States does not regard incumbency protection as a compelling state interest, and we have not argued that it is. Rather, our argument is that, in pursuing its compelling interest in creating minority opportunity

districts in order to comply with Section 2, a State may legitimately decide to give greater weight to incumbency protection than to drawing compact districts.

Finally, the district court concluded that the State's policy of protecting incumbents involved impermissible race-based action because Democratic incumbents, particularly Frost and Bryant in Dallas, sought to include black voters in their districts. J.S. App. 79a-81a, 85a. As the evidence shows, however, Frost and Bryant generally strove to keep in their districts as many Democratic areas that they had previously represented as possible—regardless of the race of the voters in the areas. *Id.* at 35a-38a & n.23. For example, Frost and Johnson fought vigorously over a largely white Democratic portion of Grand Prairie before compromising and splitting the area between them. U.S. Exh. 1071, at 37-40.

It is true that many of the areas over which Frost, Bryant, and Johnson struggled most intensely were predominantly black areas. But that is because those areas were heavily Democratic and had provided consistent support to Frost and Bryant in previous elections. J.S. App. 35a-38a & n.23. In fact, evidence indicated that 97% of black voters in the Dallas-Fort Worth area had voted in the Democratic primary. *Id.* at 37a. As one witness cited by the district court explained, "Frost and Bryant were not concerned about the race of these voters. They just wanted to hold onto enough Democrats to assure reelection." *Id.* at 36a.

Given those undisputed facts about the motivation of Frost and Bryant, the district court erred as a matter of law in holding that the inclusion of black voters in their districts constituted impermissible racial discrimination. Under this Court's decisions, to constitute impermissible discrimination under the Equal Protection Clause, action must taken because of, rather than merely with knowledge

of, a person's race. See *Miller*, 115 S. Ct. at 2488; see *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979). Here, the evidence showed that black voters were moved into Frost's and Bryant's districts because of their party affiliation, not because of their race.[3]

* * * * *

For the reasons discussed, the district court applied an incorrect legal standard on both the compelling interest and narrow tailoring prongs of strict scrutiny. Moreover, the evidence we have discussed shows that the State's plan satisfies strict scrutiny under the correct legal standards. The district court, however, has not yet issued findings of fact under the correct standards and this Court may not wish to perform that function in the first instance. Accordingly, the district court's judgment should be reversed or, alternatively, the decision should be vacated and the case remanded for a decision under the correct legal standards.

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[3] While incumbency protection is a legitimate redistricting criterion, it would not justify a plan that dilutes minority voting strength in violation of Section 2. See S. Rep. No. 417, *supra*, at 29 & n.117. Moreover, as courts have recognized, an asserted interest in protecting incumbents can mask intentional discrimination against minority voters. See *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *id.* at 778-779 (Kozinski, J., concurring and dissenting in part); *Ketchum*, 740 F.2d at 1408; *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court). Here, the State sought to serve both its interest in avoiding diluting minority voting strength and its interest in protecting incumbents.

CONCLUSION

The judgment of the district court should be reversed or, alternatively, the decision should be vacated and the case remanded for a decision under the correct legal standards.

Respectfully submitted.

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